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Public School Finance Litigation in New York and Massachusetts: The Bad Aftertaste of a Campaign for Fiscal Equity Win in New York

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NOTES

PUBLIC SCHOOL FINANCE LITIGATION IN NEW YORK AND MASSACHUSETTS: THE BAD AFTERTASTE OF A *CAMPAIGN FOR FISCAL EQUITY* WIN IN NEW YORK

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All state constitutions have an education clause requiring the state legislature to provide its schoolchildren with a free public education.[1] State courts have interpreted these clauses as conferring a duty upon the legislature to provide not merely a free education, but an education meeting a standard of equality or adequacy.[2] The states of New York and Massachusetts have

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[1] *See* Molly S. McUsic, Symposium, *Brown at Fifty: The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1345–46 (2004) (providing overview of state education finance litigation); *cf.* Rodriguez v. San Antonio Unified Sch. Dist., 411 U.S. 1, 35 (1973) (finding that "[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution" nor is there a basis for concluding that it is implicitly protected).

[2] *See* McUsic, *supra* note 1, at 1346 (describing two theories: (1) "that the education clause mandates some measure of equality that the state financing laws fail to provide and perhaps cannot provide so long as they rely heavily on local property wealth" and (2) "that the education clause requires a certain minimum level of education and that the school district is failing to provide educational services sufficient to satisfy the state's

both subscribed to an adequacy standard. The New York Court of Appeals, in the case of *Board of Education, Levittown Union Free School District v. Nyquist*,[3] interpreted the state constitution as requiring the New York State Legislature to provide a "sound basic education" to the public school children of New York State.[4] The Massachusetts Supreme Court announced its state constitutional duty to "cherish the interests of . . . public schools" in *McDuffy v. Secretary of the Executive Office of Education*.[5] Although these standards were articulated in different manners, both encompass the same sort of adequacy theory.[6]

That is why it comes as such a surprise that both of the respective state courts came to opposite decisions in their subsequent public school finance cases. The New York case of *Campaign for Fiscal Equity, Inc. v. State of New York (CFE II)*[7] and *Hancock v. Commissioner of Education*[8] in Massachusetts, both came to their respective highest state courts in similar fashions, brought by similar plaintiffs seeking similar remedies. In both cases, under-funded school districts sued their respective states claiming that a constitutional duty owed to the public school children had been violated.[9] The New York Court of Appeals held, in *CFE II*, that the state legislature was not living up to its constitutional mandate under the precedent set in *Levittown* and, therefore, ruled in favor of the plaintiff school

constitutional obligations."); C. Cora True-Frost, Note, *Beyond Levittown Towards A Quality Education For All Children: Litigating High Minimum Standards For Public Education*, 51 SYRACUSE L. REV. 1015, 1026–27 (2001) (stating that education clause arguments are not limited merely to equality, but also "for minimal adequacy in all students' education as defined by both inputs and outcomes.").

3 439 N.E.2d 359 (N.Y. 1982), *appeal dismissed*, 459 U.S. 1138 (1983).

4 *Id.* at 369 (interpreting the term "education" in education clause of New York State Constitution); *see* True-Frost, *supra* note 2, at 1027 (describing court's holding in *Levittown*).

5 615 N.E.2d 516 (Mass. 1993).

6 *Compare Levittown*, 439 N.E.2d at 369 (stating reluctance to override legislature's decisions "by mandating an even higher priority for education in the absence, possibly, of gross and glaring inadequacy") *with McDuffy*, 615 N.E.2d at 602 (explaining that prior Massachusetts case law is consistent with the view that Part II, c. 5, Section 2 of Massachusetts Constitution imposes a duty to provide an adequate education to young people).

7 801 N.E.2d 326 (N.Y. 2003) [hereinafter *CFE II*].

8 822 N.E.2d 1134 (Mass. 2005).

9 *See CFE II*, 801 N.E.2d at 328 (reviewing claim by plaintiffs that New York failed to achieve its own constitutional requirements for educational fiscal standards); *Hancock*, 822 N.E.2d at 1138 (Marshall, C.J., concurring) (parsing out facts regarding suit for poor performance of education initiatives in Massachusetts).

districts.[10] Meanwhile, the Supreme Judicial Court of Massachusetts in *Hancock*, decided that even though the children of the distressed schools were not receiving their constitutionally guarded education, the court would not grant judgment against the state, in hopes that a reform plan, already in place, would eventually have the intended remedial effect.[11]

This comment will contrast how the two courts came to different results despite similar precedent. It will analyze the respective decisions and the factors that played a role in leading to them. Finally, the comment will examine the effect that the *CFE II* decision will have on New York State public school children and the state as a whole.

I. CASE BACKGROUNDS

In *Levittown*, the New York Court of Appeals interpreted the New York State Constitution's education clause, which reads, "the legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[12] The court held this to mean that New York had to provide "a sound basic education" to all state schoolchildren.[13] Ultimately, the court never set forth a test to determine if the New York schoolchildren were receiving an adequate education because it never articulated what was encompassed by the amorphous phrase: "a sound basic education."[14]

[10] *See CFE II*, 801 N.E.2d at 328 (affirming judgment for plaintiff school districts based upon precedent standards set in Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359 (N.Y. 1982)); Helen Hershkoff, *Perspectives: Notable Dissents in State Constitutional Cases: Judge Fuchsberg's Levittown Dissent: The Evolving Right to An Adequate Education*, 68 ALB. L. REV. 381, 384 (2005) (discussing *CFE II's* outcome and its influence from Judge Fuchsberg's dissent in *Levittown*).

[11] *See Hancock*, 822 N.E.2d at 1156 (stating "the evidence here is that the Commonwealth's comprehensive Statewide plan is beginning to work in significant ways"); *Recent Developments in the Law: Primary and Secondary Education*, 34 J.L. & EDUC. 560, 564–65 (2005) (highlighting outcomes of recent landmark state education cases, including *Hancock*).

[12] NY Const. art. XI §1; *see* Board. of Ed., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 368 (N.Y. 1982) (quoting New York's Constitution).

[13] *See id.* at 369 (interpreting New York's constitutional requirements for education); *see also* Richard Wesley, *Issues Facing the Judiciary: If Legislators Fail, Who is There to follow?*, 68 ALB. L. REV. 703, 707 (2005) (highlighting court's ruling in *CFE II* and its reliance on *Levittown's* progeny regarding New York constitutional interpretation).

[14] *See Levittown*, 439 N.E.2d at 369 (leaving constitutional language ambiguous and generally untouched); *see also* Denise C. Morgan, *Every Silver Lining has a Cloud: The Lost Federal Claim in Campaign for Fiscal Equity, Inc. v. New York*, 31 FORDHAM URB.

After the *Levittown* decision, the Campaign for Fiscal Equity filed suit on behalf of New York City schoolchildren claiming that New York State's method of funding city school districts violated the education article of the State Constitution.[15] In this case (*CFE I*), the New York Court of Appeals: 1) enforced the holding of *Levittown*, reiterating that the state bore the responsibility to provide its schoolchildren with a sound basic education,[16] 2) recognized its duty to adjudicate the matter, outlining what was entailed by "a sound basic education,"[17] and 3) concluded that the plaintiffs had pleaded facts that, if proven, would constitute a violation of the state constitution.[18] The Court of Appeals sent the case back to the trial court, and an extensive and lengthy trial ensued.[19] The trial court found a violation of the state constitution using the "sound basic education" framework that the Court of Appeals had provided, but the Appellate Division reversed the decision on the law and facts, finding that the trial court used the wrong definition of a "sound basic education."[20]

L.J. 1291, 1293 (2004) (stating that *Levittown* created low standards for New York to meet by holding that as long as children were receiving a "sound basic education", absent some "gross and glaring inadequacy" there would be no state constitutional violation).

15 *See* Campaign for Fiscal Equity v. New York, 86 N.Y.2d 307 (1995) [hereinafter *CFE I*]; *see also* Cerisse Anderson, *Challenge to School Aid Formula Survives*, N.Y. L.J. , June 30, 1994 (detailing courts rejection of the suit as brought by City of New York itself as plaintiff as to lack of standing but allowance of the advocacy group Campaign for Fiscal Equity to bring the discrimination suit).

16 *See CFE I*, 86 N.Y.2d at 316 (interpreting Levittown decision as leaving open possibility that if New York State failed to provide a sound basic education that it would violate Education Article of New York State Constitution).

17 *See id.* at 317. The court stated that certain "essentials" need to be present including:

> [M]inimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies, by sufficient personnel adequately trained to teach those subject areas.

Id. at 317.

18 *Id.* at 318 (stating that complaint "if proven, could support a conclusion that the State's public school financing system effectively fails to provide for a minimally adequate educational opportunity").

19 *See School Suit Doesn't Fit Kids*, DAILY NEWS (N.Y.), Oct. 12, 1999, at 30 (labeling law suit "ridiculous" and "expensive" while finding it ironic that plaintiff boasts the title of "fiscal"); Peter Simon, *Group Challenging State's School Funding Formula to Call; Mills, Sobol to Testify*, THE BUFFALO NEWS, Feb. 6, 1999, at 4C (detailing witnesses called and lengthy pretrial depositions).

20 *See* Campaign for Fiscal Equity v. New York, 744 N.Y.S.2d 130, 137–38 (1st Dep't 2002), *modified by* 801 N.E.2d 326 (N.Y. 2003); Tom Perrotta, *Funding of Schools Ruled Constitutional By Appellate Court Panel Reverses DeGrasse's Landmark Ruling*, N.Y. L.J.., June 26, 2002 (reporting how Court of Appeals found that New York State had not

The plaintiffs appealed to the Court of Appeals, who in *Campaign for Fiscal Equity v. New York State (CFE II)*[21] clarified its interpretation of a "sound basic education" and found that the State had failed to provide such education to New York City schoolchildren.[22] The *CFE II* court expanded its previous definition of a "sound basic education" as one that "conveys not merely skills, but skills fashioned to meet a practical goal: meaningful civic participation in contemporary society."[23] The Appellate Division believed that this standard should be pegged at the eighth or ninth grade level, but the *CFE II* court found no need for a grade-specific inquiry, requiring only that high schools prepare students to "function productively as civic participants" in being able to both adequately serve on a jury and hold gainful employment.[24]

In *McDuffy*, the Massachusetts Supreme Judicial Court found that the education clause of the Massachusetts Constitution imposed "an enforceable duty on the magistrates and Legislatures of [the] Commonwealth to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such children live."[25] The court held that the Commonwealth had failed to meet this duty.[26] The Massachusetts Legislature immediately responded by passing

breached it's duty to provide a "sound basic education" which only obligates the state to provide for eighth or ninth grade level of education).

21 *CFE II*, 801 N.E.2d 326 (N.Y. 2003).

22 *See id.* 348–50 (stating court's findings); *see also* William F. Hammond Jr. & Kathleen Lucadamo, *New York's Top Court Says Schools Fail to Provide Basic Education*, THE NEW YORK SUN, June 27, 2003, at 1 (reviewing court's decision).

23 *CFE II*, 801 N.E.2d at 330 (articulating that a productive civic participant is one "capable of voting and serving on a jury" and having "some preparation for employment.").

24 *Id.* (stating that Appellate Division erred in applying "grade-specific" inquiry); *see* Jessica Schultz, *Economic and Social Rights in the United States: An Overview of the Domestic Legal Framework*, 11 HUM. RTS. BR. 1, 3 (2003) (providing in-depth analysis of *CFE II* case).

25 McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 555 (Mass. 1993).

26 *Id.* at 554 (holding that Commonwealth "failed to fulfill [sic] its obligation" to educate "all of its children"); *see* Craig J. Tiedemann, Comment, *Taking a Closer Look at Massachusetts Public School Expulsions: Proposing an Intermediate Standard of Judicial Review After* Doe v. Superintendent of Schools, 31 NEW ENG.L. REV. 605, 618 (1997) (describing holding in *McDuffy*).

the Education Reform Act of 1993, aimed at completely overhauling the Commonwealth's education funding program.[27]

Twelve years later, in *Hancock*, four school districts sued the Commonwealth claiming that the public education environment in the districts had not significantly changed since 1993 and that Massachusetts was still in violation of its state constitutional duty.[28] The Supreme Judicial Court upheld the decision in *McDuffy* and found a constitutional violation, but did not find in favor of the plaintiff school districts, instead deferring to the legislature.[29]

In both *CFE II* and *Hancock*, the respective state courts found the requisite causal link between the impoverished school districts and inadequate funding, leading the courts to find constitutional violations.[30] Still, the difference between the two decisions can be explained in a number of ways. This comment will examine two factors that led to such disparity: 1) the reforms in place in both Massachusetts and New York at the time of the decisions, and 2) the differences in the separation of powers doctrine inherent in both state constitutions.

II. FILLING IN THE SPACES – FACTUAL DISPARITIES

A. Reform Measures

In *CFE II*, the defendant state of New York admitted that the state education financing program was faulty and proceeded to

[27] *See* Christopher M. Morrison, Note, *High-Stakes Tests and Students with Disabilities*, 41 B.C. L. REV. 1139, 1161 (2000) (noting that Massachusetts Education Reform Act of 1993 was passed in response to *McDuffy*); Karen Swenson, *School Finance Reform Litigation: Why are Some State Supreme Courts Activists and Others Restrained*, 63 ALB. L. REV 1147, 1166 n.97 (2000) (observing that Massachusetts legislature passed the Act only three days after *McDuffy* was decided).

[28] Hancock v. Comm'r of Ed., 822 N.E.2d 1134, 1138 (Mass. 2005) (Marshall, C.J., concurring) (stating plaintiffs' complaint); *see* Maura M. Pelham, Comment, *Promulgating Preschool: What Constitutes a "Policy Decision" Under Hancock v. Commissioner of Education?*, 40 NEW ENG.L. REV. 209, 210 (2005) (analyzing Massachusetts education cases).

[29] *Hancock*, 822 N.E.2d at 1136–37 (denying relief to plaintiff); *see also* Michael Heise, Symposium, *Education and the Constitution: Shaping Each Other and the Next Century*, 34 AKRON L. REV. 73, 103–04 (2000) (providing more detailed analysis of *McDuffy* holding).

[30] *See McDuffy*, 615 N.E.2d at 555–56 (Mass. 1993) (declaring in order to meet constitutional standard, Massachusetts might have to devise plans to allocate more funds to certain schools); *see also Hancock*, 822 N.E.2d at 1155 (Marshall, C.J., concurring) (explaining insufficient revenue leads to inadequate expenditure on education).

place blame on all parties involved.[31] In *Hancock*, the Commonwealth of Massachusetts backed its education overhaul, which was implemented after the *McDuffy* decision.[32] The *Hancock* court found that this theory of "pragmatic gradualism"[33] had accomplished significant reform in the state education system and, while it had not yet cured all problems, the court believed that eventually it would.[34] The *Hancock* court gave effect to the language from the *McDuffy* decision that discussed the reform plans allowing the legislature and governor to effect "a construction adapted to carry into effect its purpose."[35] Massachusetts did not know why its impoverished school districts remained the way they did, but had no reason to believe that the reforms would not eventually aid them.[36] Conversely, New York knew why the New York City School districts were in

[31] Campaign for Fiscal Equity, Inc. v. New York, 801 N.E.2d 326, 341–45 (N.Y. 2003) (diverting blame by citing various other reasons for educational disparities such as socio-economic disadvantage, comparative spending, and city mismanagement); *see also* Morgan *supra* note 14, at 1295 (stating, "[t]he court refused to be distracted by the State's attempts to blame the Board of Education, the City, and the children who live here for the failure of our public schools, but instead placed the responsibility for ensuring a sound basic education right where the New York constitution mandates—with the state legislature.").

[32] *See Hancock*, 822 N.E.2d at 1139 (Marshall, C.J., concurring) (stating, "[a] system mired in failure has given way to one that, although far from perfect, shows a steady trajectory of progress."); *see also* Scott S. Greenberger & Maria Sacchetti, *SJC Rejects School-Funding Challenge Declines to Order Hike in Spending for Poor Districts*, THE BOSTON GLOBE, Feb. 16, 2005, at A1 (explaining *Hancock* decision constituting endorsement of post-*McDuffy* legislation).

[33] *See Hancock*, 822 N.E.2d at 1152 (Marshall, C.J., concurring) (citing Student No. 9 v. Bd of Educ., 802 N.E.2d 105, 114 (Mass. 2004), for proposition that "pragmatic gradualism . . . employs objective, measurable criteria to gauge progress"); *see also Student No. 9*, 802 N.E.2d at 114 (permitting school board reasonable manner and time within which to implement additions to curriculum).

[34] *See* Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1151–52 (Mass. 2005) (Marshall, C.J., concurring) (describing various improvements in educational standards at historically under-performing schools); *see also* Joan Vennocchi, *Where's the Stick?*, THE BOSTON GLOBE, Feb. 17, 2005, at A14 (describing changes since *McDuffy* as "incremental").

[35] *See Hancock*, 822 N.E.2d at 1152 (Marshall, C.J., concurring) (construing education clause pursuant to circumstances under which it was written, its intended goals, expected benefits, and what it sought to prevent against); *see also* McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 523 (Mass. 1993) (explaining Constitution must be interpreted so as to carry its purpose into effect).

[36] *See Hancock*, 822 N.E.2d at 1139 (Marshall, C.J., concurring) (providing that while Massachusetts acknowledged serious educational inadequacies still existed, underachieving schools were progressing due to Commonwealth's strategies); *see also An Educated Ruling*, THE BOSTON GLOBE, Feb. 16, 2005, at A18 (referring to *Hancock* decision as "sensible" because it recognized that extensive funds were being allocated towards previously under-performing schools and that Massachusetts officials had devised long-term plans for reform).

such abysmal condition.[37] The formulas used to determine the funding for each school district were not functioning as planned.[38] After the case had come to the Court of Appeals, but before the decision was given, New York had implemented reforms aimed at rectifying the problems.[39] The court considered this factor but stated that it was "bound to decide this case on the record before [it] and [could not] conjecture about the possible effects of pending reforms."[40]

B. Separation of Powers

The main factor leading to the different results in these two cases is the different makeup of the New York State Constitution as opposed to the Commonwealth of Massachusetts Constitution.[41] The fact that these two courts could come to such opposite decisions may seem surprising at first, but the result can easily be understood by recalling the system of federalism to which our nation has subscribed.

When the United States Constitution was written, Anti-Federalists adamantly demanded that each state be given the ability to craft its own constitution in order to protect its constituents against the possibility of a tyrannical federal

[37] *See CFE II*, 801 N.E.2d 326, 336–37, 340 (N.Y. 2003) (describing New York City school districts' "educational inputs" as inadequate, specifically, "teachers, facilities and instrumentalities of learning."); *see also Decision of the Day*, N.Y. L.J., Feb. 4, 2004, at 18 (alleging various inadequacies in New York City schools).

[38] *See CFE II*, 801 N.E.2d at 348 (noting that New York's formula for allocating school funds does not take into account higher operating costs in city schools); *see also* R. Craig Wood, *The Law of Financing Education: Constitutional Challenges to State Education Finance Distribution Formulas: Moving from Equity to Adequacy*, 23 ST. LOUIS U. PUB. L. REV. 531, 557–58 (2004) (stating inadequacy of New York City's school funding to the state distributional formula).

[39] *CFE II*, 801 N.E.2d at 345–46 (describing reforms, including Schools Under Registration Review (SURR), laws giving mayor of NYC more control over school finances, Regents reducing employment of uncertified teachers, and certain regulations adopted within Learning Standards); *see* Abby Goodnough, *An Overhaul In Building of Schools*, N.Y. TIMES, Nov. 1, 2002, at B5 (describing merger of New York cities School Facilities Division and School Construction Authority, saving costs school construction costs attributable to poor communication between the entities, and leaving more funds for other school needs).

[40] *CFE II*, 801 N.E.2d at 346.

[41] *See* N.Y. CONST. art. XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."); Mass. CONST. Pt. 2, Ch. 5, § 2 (stating "it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns").

government.[42] For this reason, each state was the architect of its own government.[43] The only real limit is embodied in the Guaranty Clause of the U.S. Constitution which states that, "the United States shall guarantee to every state in this union a republican form of government . . . ."[44] Only the legislature, not the courts, is permitted to assess questions regarding the Clause.[45] However, each state court must independently interpret its state constitution in order to protect citizens from being attacked by both their state government and the federal government.[46]

There are three types of state constitution separation of powers ideals.[47] Most state constitutions, thirty five to be exact, contain a strict separation of powers provision similar to Massachusetts in that the provision not only divides power, it also restricts one branch from exercising any power possessed by the others branches.[48] Other state constitutions either have a provision separating powers, but not restricting intervention, or make no

[42] *See* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1172 n.13 (1999) (stating Anti-Federalists concern with central government and its implication on individual rights); Calvin R. Massey, *Commentary on the Symposium on Interpreting the Ninth Amendment: AntiFederalism and the Ninth Amendment*, 64 CHI.-KENT. L. REV. 987, 987 (1988) (describing Anti-Federalist's concern with maintaining state's status as an "autonomous unit," and how this is accomplished through state constitutions).

[43] *See* Rossi, *supra* note 42, at 1170 (observing states reach different results than federal government because states are "distinct institutions of governance, in terms of . . . [their] decision-making structures"); Massey, *supra* note 42, at 987 (stating that states use their constitutions to "preserve areas of individual life inviolate from invasion by the federal Congress").

[44] U.S. CONST. art IV. § 4.

[45] *See* Baker v. Carr, 369 U.S. 186, 218 (1962) (holding Guaranty Clause claims to be nonjusticiable political questions); Samuel Issacharoff, *Symposium: Law and Political Parties: Introduction: The Structures of Democratic Politics*, 100 COLUM. L. REV. 593, 593 n.2 (stating Supreme Court has found Guaranty Clause claims nonjusticiable).

[46] *See* Jim Rossi, *Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343, 1358 (2005) (asserting "state power, in other words, does not exist solely to serve the state polity; it also exists to protect individuals from tyrannical acts on the part of both state and national governments"); James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725, 1732 (2003) (arguing state courts may serve as bulwarks against abusive national power in interpreting state constitutions).

[47] *See* Rossi, *supra* note 42, at 1190 (delineating basic approaches to state constitution separation of powers clauses); John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1236–37 (2003) (detailing three approaches).

[48] *See* Rossi, *supra* note 42, at 1191 (noting majority approach); Devlin, *supra* note 47, at 1236–37 (noting majority's stringent approach).

mention of separation of powers at all.[49] New York falls into the latter category, with the separation of powers inferred from the structure of the government.[50]

The founding fathers of our country used the existing separation of powers doctrines embedded in the constitutions of Virginia, Maryland, North Carolina, Georgia, and Massachusetts to fuel the fires of debate about the separation of powers provisions to be included in the United States Constitution.[51] The Massachusetts Constitution is one of the oldest in the nation and articulates one of the harshest separation of powers doctrines: "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it shall be a government of laws and not of men."[52]

The *Hancock* court read the separation of powers provision along with another portion of the Massachusetts Constitution that states "it shall be the duty of legislatures and magistrates in all future periods of this commonwealth, to cherish the interests of . . . public schools"[53] as giving wholesale responsibility to the legislature and governor in the education arena without judicial intervention.[54] The court read the language "legislatures and magistrates" to refer to the Massachusetts Legislature and

[49] *See* Rossi, *supra* note 42, at 1191 (discussing more lenient approaches); Devlin, *supra* note 47, at 1236 (noting alternatives to strict separation of powers clauses).

[50] *See* Devlin, *supra* note 47, at 1236 n.109 (noting omission of explicit reference to separation of powers in New York's Constitution); N.Y. CONST. art. III, § 1 (vesting legislative power in senate and assembly); N.Y. CONST. art. IV, § 1 (vesting executive power in governor); N.Y. CONST. art. VI, § 1 (providing for state "unified court system").

[51] *See* Rossi, *supra* note 42, at 1191 (tracing origin of state constitution separation of powers clauses to aforesaid states); Bernard Schwartz, *Curiouser and Curiouser: The Supreme Court's Separation of Powers Wonderland*, 65 NOTRE DAME L. REV. 587, 588–89 (1990) (noting influence of Massachusetts' clause).

[52] *See* Rossi, *supra* note 42, at 1190 (quoting Mass. CONST. pt. 1, art. XXX).

[53] Mass. CONST. pt. 2, ch. V, § I, art. III.

[54] *See* Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1160 (Mass. 2005) (quoting, "[o]ur Constitution requires that the duty be fulfilled by the legislative and executive branches, without oversight or intrusion by the judiciary"); Maura M. Pelham, Comment, *Promulgating Preschool: What Constitutes a "Policy Decision" Under Hancock v. Commissioner of Education?*, 40 NEW ENG. L. REV. 209, 255–56 (2005) (announcing judiciary's minimum involvement in determining educational standards).

Governor, respectively.[55] The court also invoked the ubiquitous judicial phrase: "This court is not a '[S]uper Legislature'" in declining to rule on the issue.[56] The court was also attempting to prevent the members of the legislature from exculpating themselves from blame for the education finance shortcomings.[57]

In reaching its decision, the court also gave much weight to the fact that the education clause in the Massachusetts Constitution was placed in the "Frame of Government" section rather than in the "Declaration of Rights."[58] The court found this subtlety to showcase how education was related to the very existence of government itself, and therefore must be formulated by the legislature and governor alone.[59] On the other hand, if the education clause was placed in the Declaration of Rights section, it would indicate its existence as an individual state citizen right which would dictate mandatory protection by the Massachusetts Judiciary.[60]

As opposed to Massachusetts, which subscribes to a strict separation of powers view, the New York Constitution formulates a traditional flexibility in the separation of powers.[61] The New

55 *Hancock*, 822 N.E.2d at 1160 (explaining language of education clause); Pelham, *supra* note 54, at 217–18 (commenting on specific language in education clause to indicate duties of legislative and executive branches).

56 *Hancock*, 822 N.E.2d at 1163 (positing court's limitation to monitor members of General Court); Pelham, *supra* note 54, at 260 (noting court's refusal to act as "super legislature").

57 *Hancock*, 822 N.E.2d at 1164 (arguing if, "this court were once again to fashion a judicial remedy, the elected officials, who pursuant to our Constitution, ought to bear the ultimate burden of resolving our current educational debate would have been insulated from public accountability"); Pelham, *supra* note 54, at 218 (explaining primary responsibility of education is left to legislative and executive branches regardless of local municipalities' involvement).

58 *Hancock*, 822 N.E.2d at 1151–52 (citing statement McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516, 527 (Mass. 1993), "placement of education clause in Massachusetts Constitution indicates structurally . . . that education is a 'duty' of government . . . [t]he framers' decision to place the provisions concerning education in 'The Frame of Government' – rather that in the 'Declaration of Rights' – demonstrates that the framers conceived of education as fundamentally related to the very existence of government.").

59 *Hancock*, 822 N.E.2d at 1153 (explaining dual authority of legislative and executive branches); *McDuffy*, 615 N.E.2d at 521–22 (discussing specific obligations of two branches under education clause).

60 Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1153 (Mass. 2005) (emphasizing that Governor and legislature must establish a plan to educate all children under education clause). *See generally* Doe v. Superintendent of Sch. of Worcester, 653 N.E.2d 1088, 1095–96 (Mass. 1995) (stating right to education is not a fundamental right worthy of strict scrutiny).

61 Anthony Neddo, Comment, *Prosecutorial Discretion in Charging the Death Penalty: Opening the Doors to Arbitrary Decisionmaking in New York Capital Cases*, 60 ALB. L. REV. 1949, 1952 (1997) (noting traditional separation of power expressed in New York

York Constitution has provisions establishing the framework of the government while not prohibiting necessary encroachments onto the powers of the other branches.[62] While the actions of the Executive and Legislative branches receive a presumption of validity, the Judiciary, when necessary, can and must exercise its power to protect the rights of state citizens.[63]

The court in *CFE II* acknowledged the separation of powers doctrine inherent in the government, but concluded that it was bound to decide the case in front of it because of the constitutional violation present.[64] The judiciary did not overstep its bounds, however, as it did not violate the separation of powers by dictating how the legislature should spend state funds.[65] Instead, the judiciary directed the legislature to conduct a study to find the "actual cost of providing a sound basic education" in the NYC public schools, and to take action to remedy the situation.[66]

Constitution); Susan V. Demers, *The Failures of Litigation as a Tool for the Development of Social welfare Policy*, 22 FORDHAM URB L.J. 1009, 1033 (1995) (commenting on New York State's version of separation of powers regarding policy issues).

62 *See* N.Y. CONST. art. III, § 1, art. IV, § I; art. VI (delineating three branches of New York state government); *see also* Klostermann v. Cuomo, 61 N.Y.2d 525, 541 (1984) (holding that court was granting plaintiff's request that court order defendant to fulfill non-discretionary obligation, and clarifying that "[t]he activity that the courts must be careful to avoid is the fashioning of orders or judgments that go beyond any mandatory directives of existing statutes and regulations and intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches.").

63 *See* Board. of Ed., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 363–64 (1982) (opining that although it is normally inappropriate for courts to infringe upon legislative and judicial decision-making, "it is nevertheless the responsibility of the courts to adjudicate contentions that actions taken by the Legislature and the executive fail to conform to the mandates of the Constitution"); *see also* Demers, *supra* note 61, at 1012 (explaining that although "[l]itigation has been and will continue to be necessary" to ensure effective social policy, "judges should not fashion wide ranging relief that substitutes their views of policy, or those of the litigant, for those of the legislatures and the executive branch officials").

64 *See CFE II*, 801 N.E.2d 326, 344–45 (N.Y. 2003) (stating that "it is the province of the Judicial branch to define and safeguard rights provided by the New York State Constitution, and order redress for violation of them."); *see also* N.Y. CONST. art. XI, § 1 (charging legislature with responsibility to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated").

65 *See CFE II*, 801 N.E.2d at 347 (stating that "we know of no practical way to determine whether members of the political branches have complied with an order that the funding process become as transparent as possible, and we therefore decline to incorporate such a directive into our order."); *see also* Demers, *supra* note 61, at 1014 n.33 (noting that a court may not order the legislature to appropriate money, because the New York State Constitution commits that prerogative to the legislature).

66 *CFE II*, 801 N.E.2d at 348.

III. THE NEW YORK REMEDY

New York State Governor George Pataki called the decision "an extraordinary measure" to improve New York schools.[67] This may have been more of a political spin than a statement of things to come, considering that this was a decision *against* the State. Though the *CFE II* court held that New York State had breached its constitutional duty, the remedy that it handed out was too vague to have any immediate effects.[68] The court correctly followed the separations of power doctrine by not commanding the legislature to appropriate state moneys in a particular manner, but it did not set firm enough guidelines for the legislature to achieve the desired result.[69]

The court in *CFE II* gave the New York state legislature a deadline of July 30, 2004 to implement the changes.[70] It must have forgotten that this was the same state legislature that had not passed a state budget on time in any of the preceding twenty years.[71] Not surprisingly, the Legislature did not meet the July 30, 2004 deadline either.[72]

67 *See* John Caher, *Governor Summons Legislature To Address Education Funding; Special Session Called As Court Deadline Nears*, N.Y. L.J., July 2004, at 1 (quoting Pataki on his reaction to *CFE II*); *see also* William F. Hammond Jr., *Deadline Missed, Plaintiffs Press for School Funds*, N.Y. SUN, July 30, 2004 ¶ 8 (noting that in wake of *Campaign for Fiscal Equity*, Gov. Pataki and leaders of Assembly and Senate were unable to agree on education reform, thus forcing education overhaul back into court).

68 *See CFE II*, 801 N.E.2d at 349 (commenting that "[i]t is, rather, an effort to learn from our national experience and fashion an outcome that will address the constitutional violation instead of inviting decades of litigation."); *see also At Taxpayer's Expense*, N.Y. TIMES, Aug. 22, 2004, at 14WC (observing that after *Campaign for Fiscal Equity* court told Executive and Legislature to reform New York City public education, Executive and Legislature "handed that tough job back to court").

69 *See CFE II*, 801 N.E.2d at 348 (stating that state needed to decide actual cost of providing "sound basic education" and institute "accountability" standards to measure such reform); Oreen Chay, Case Comment, Campaign for Fiscal Equity, Inc. v. State, 48 N.Y.L. SCH. L. REV. 613, 614 (2004) (discussing *CFE II* holding, which required state to decide actual cost of providing "sound basic education" to New York City schools and to institute accountability standards to measure reform).

70 *See CFE II*, 801 N.E.2d 326, 348 (N.Y. 2003) (recognizing need for a reasonable timeline, the court chose July 30, 2004); *see* David M. Herszenhorn, *In Schools Case, A Certainty: Only 400 Days to Comply*, N.Y. TIMES, June 28, 2003, at B3 (quoting some state lawmakers who criticized short amount of time granted by the court).

71 *See* Michael Cooper, *Ballot Measure Calls for a Power Shift to Overhaul a Budget Process*, N.Y. TIMES, Oct. 31, 2005, at B1 (discussing habitual lateness of state budget); *see also* Robert Whalen, *New York Passes Budget!: Approval Ends Over 20 Years of Blown Deadlines*, THE BOND BUYER, Apr. 1, 2005, at 1 (noting that this was first budget finished on time in more than twenty years).

72 *See* Whalen, *supra* note 71, at 1 (noting that although the state has submitted a budget on time, this budget did not address the overdue court order to increase funding in New York City schools); *see also* Westchester Weekly Desk, *At Taxpayer's Expense*, N.Y.

On September 3, 2003, Governor George E. Pataki established the Zarb Commission by Executive Order No. 131.[73] Headed by former NASDAQ Chairman Frank Zarb, the study suggested a number of changes in construction funding, such as giving districts more flexibility. The Commission also suggested creating a new Office of Educational Accountability, which would make sure schools operate effectively and efficiently.[74] The Commission's findings were used by a panel of referees appointed by New York County Supreme Court Justice Leland Degrasse in determining how to carry out the judgment.[75] This panel of referees recommended that the court issue an order requiring the defendants to:

> 1) implement an operational funding plan that will provide the New York City School District additional operating funding of at least $5.63 billion phased in over a four-year period; 2) undertake periodic studies to determine the costs of providing the opportunity for a sound basic education to all students of the New York City schools; 3) implement a plan which provides for additional capital funding of at least $9.179 billion over the next five years; 4) undertake periodic studies to determine the amount of annual additional funding, if any, required to provide the New York City School District in subsequent years with facilities sufficient to

TIMES, Aug. 22, 2004, at 14WC13 (highlighting failure of legislature to increase education funding).

73 *See* 9 NYCRR § 5.131 (2006) (ordering commission to "study and recommend to the Governor and the Legislature reforms to the education finance system in New York State and to any other state or local laws, rules, regulations, collective bargaining agreements, policies or practices, to ensure that all children have the opportunity to obtain a sound basic education, in accordance with the requirements of Article XI, §[1 of the State Constitution and applicable decisional law"); *see* Al Baker, *How to Obey Schools Ruling? Pataki and Bloomberg Differ*, N.Y. TIMES, Nov. 27, 2003, at B1 (commenting on creation of Zarb commission).

74 *See The New York State Commission on Education Reform, Ensuring Children an Opportunity for a Sound Basic Education, Final Report* 41,Campaign for Fiscal Equity, Inc., March 29, 2004, *available at* http://www.cfequity.org/zarbfinalreport.pdf (recommending that state create an Office of Educational Accountability); *see also* Rick Karlin, *School building costs added to funding plan; Group says state needs to spend more than $19 billion to help education*, THE TIMES UNION, Apr. 14, 2004, at A1 (discussing need for accountability and efficiency in public schools).

75 *See Report and Recommendations of the Judicial Referees, Campaign for Fiscal Equity v. New York* 100 N.Y.2d 893 (No. 111070/93), Campaign for Fiscal Equity, Inc., Nov. 30, 2004, *available at* http://cfequity.org/compliance/RefereesFinalReport11.30.04.pdf (submitting final report to Justice Leland DeGrasse of Supreme Court of New York, County of New York); *see also* Justice DeGrasse, *Decision of Interest; New York Supreme Court, New York County, Court Confirms Recommended Increase In State Funding for City Schools*, N.Y. L.J. , Feb. 18, 2005, at 22 (noting committee of referee's made a list of findings and recommendations to submit to Degrasse).

> provide all of its students with the opportunity for a sound basic education; 5) continue such operations funding and capital improvement funding studies until they are no longer needed to assure that all New York City students receive the opportunity for a sound basic education; and 6) enhance New York's accountability structure in a manner essentially agreed upon by the parties.[76]

The court endorsed the referee's findings and ordered the state to comply. Justice DeGrasse gave the legislature and governor 90 days to implement the plan.[77] Governor Pataki has vowed to appeal the decision, while CFE has vowed to fight in order for its win in court to pay some dividends in the real world.[78] Although Justice DeGrasse stated that spending should be implemented over a period of four years, he never stating who should pay for it.[79] That has lead to conflicts between the state, the City of New York and CFE about who should foot the bill.[80] While the New York State budget for 2005 did come out on time, it essentially ignored the court's order.[81] Education spending was placed at only $830 million, while it should have been over $2.1 billion under Justice DeGrasse's formulation.[82]

76 *Id.* (outlining specific recommendations made by referees).

77 *See Notice of Entry* 5, *Campaign for Fiscal Equity v. New York*, 100 N.Y.2d 893 (No. 111070/93), Campaign for Fiscal Equity, Inc., March 22, 2005, *available at* http://cfequity.org/ compliance/degrassefinalorder031505.pdf (holding that state shall take all steps necessary to implement and "operational funding plan").

78 *See Governor Pataki Finally Files Notice of Appeal in* CFE *case*, New York State School Finance Reform, Apr. 2005, http://finance.tc-library.org/Content.asp?uid=1335 (Apr. 2005) (reporting governor's announced intent to appeal the ruling and his notice to his opponents); *see also At Oral Argument, CFE Urges Appeals Court to Deny Appeal, Expedite Decision*, Campaign for Fiscal Equity, Inc., Oct. 11, 2005, http://www.cfequity.org/10-11-05hearing2.htm (referring to ongoing battle in court and appealing governor to comply with prior ruling).

79 *See* DeGrasse, *supra* note 75, at 22 (confirming referee's report and requiring funding to be phased in over four years); *see CFE II*, 801 N.E.2d 326, 349 (N.Y. 2003) (specifying that burden is to be shared between City and State).

80 *School FundingDdevelopments Go Different Directions Across U.S.*, YOUR SCHOOL AND THE LAW, Mar. 9, 2005, at Vol. 35, No. 5 (pointing out differing viewpoints on court order); *see Court Confirms Recommended Increase*, *supra* note 75, at 22 (citing City's position that it should not pay any of addition money required).

81 Al Baker, *Albany Passes Budget on Time; A First Since '84*, N.Y. TIMES, Apr. 1, 2005, at A1 (heralding timely budget and stating that court order on increased City funding was not heeded); *see* Whalen, *supra* note 71, at 1 (announcing on-time arrival of budget).

82 *See* Baker, *supra* note 81 (noting that required additional $1.4 billion for City schools was left out); Whalen, *supra* note 71 (stating that education spending was set at less than half of what was required).

Rather than being state-wide in reach, the CFE judgment applied only to the blighted New York City school districts.[83] The decision has resulted in much disagreement among state legislators, with upstate legislators feeling that their constituents are now paying more for New York City schools.[84] This has led to another lawsuit brought by the New York Civil Liberties Union on behalf of numerous under-funded Upstate New York and Long Island school districts.[85] The Appellate Division dismissed the action because the plaintiffs aimed their complaint at specific schools and not at the school districts as a whole. Additionally, the complaint was dismissed because the plaintiffs did not assert that the schools were being under-financed, but, rather, that New York State was not doing its best to ascertain why the schools were not providing their students with a sound basic education.[86] It seems almost certain that more litigation will ensue, and a more direct argument in the future may justify holding New York State liable for breaching its constitutional duty again.

CONCLUSION

So although the New York Court of Appeals did take action, it appears such action has resulted only in continued conflict. However, three years remain for the legislature to implement the

83 *See CFE II*, 801 N.E.2d at 327 (framing CFE's claim against New York City); *see Education Advocates, Policymakers Urge Pataki, "Don't Appeal"; Announce Launch Of Statewide Web Campaign*, Campaign for Fiscal Equity, Inc., Feb. 16, 2005, http://www.cfequity.org/02-16-05 pressconf.htm (specifying applicability of judgment to New York City).

84 *See* Marshand Boone, *Reforming School Aid*, OBSERVER-DISPATCH (Utica, N.Y.), Mar. 24, 2005, at 1A (describing upstate Senator's worry that too large a proportion of money will head to New York City); *see also* Charles Upton Sahm, *Education Policy in Wonderland*, CITY JOURNAL, July 26, 2005, at Vol. 15, No. 3, 68–71 (remarking on upstate opposition to spending money on City schools).

85 New York Civil Liberties Union v. State, 771 N.Y.S.2d 563, 565 (3d Dep't 2004) (noting that plaintiffs were concerned with 27 upstate schools), *aff'd*, 4 N.Y.3d 883 (2005); *see* John Caher, *Second Suit Over Education Funding Is Dismissed*, N.Y. L.J. ., Feb. 16, 2005, at 1 (noting existence and outcome of new post-*CFE* education funding suit).

86 *See N.Y. Civil Liberties Union*, 771 N.Y.S.2d at 566 (holding that relief was precluded on account of precedent set in *Paynter v. State*); *see also* Paynter v. State, 797 N.E.2d 1225, 1229 (N.Y. 2003) (explaining that "allegations of academic failure alone, without allegations that the State somehow fails in its obligation to provide minimally acceptable educational services, are insufficient to state a cause of action under the Education Article").

order.[87] It may be that this is an example of a time when the judiciary should not wade into the murky waters that may only be navigated by the legislative branch. The legislature is the branch existing to determine state spending, and now it must take orders from the judiciary, whose experience lies in resolving "cases and controversies"[88] and not in solving broad socioeconomic problems.[89] This may be a prime example of a "political question" that is reserved for the Legislature alone.[90] If this is true, it appears that the *Hancock* court, in Massachusetts, has taken the more prudent approach.

In considering the makeup of the New York State government, however, the Court of Appeals had the responsibility to rule that the legislature had not met its constitutional charge and, similarly, had the duty to command it to take action in order to rectify the on-going problem.[91] The problem that remains to be solved is that the Court's order may not be enforceable. The Legislature may simply choose not to follow it, and the Judiciary may have no recourse. However, the more perplexing problem is

87 *See* DeGrasse, *supra* note 75, at 22 (highlighting Justice DeGrasse's plan, proposed one year ago, to increase New York City school funding by $5.63 billion phased in over a four year period); *see also CFE II*, 801 N.E.2d 326, 348 (N.Y. 2003) (ordering that defendants ascertain "the actual cost of providing a sound basic education in New York City" in an effort to implement reforms and providing impetus for reforms from which Justice DeGrasse's funding plan stemmed).

88 *See CFE II*, 801 N.E.2d at 341 (concluding that spending priorities are within the province of legislature); *see also* N.Y. CONST. art. XI, § 1 (mandating that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated"); N.Y. CONST. art. VI, § 1 (establishing unified court system for state of New York to resolve pending cases and controversies).

89 *See CFE II*, 801 N.E.2d at 341–42 (discussing idea that poor student performance is caused by socioeconomic conditions which is best remedied by the legislature through decisions about spending priorities); *see also CFE I*, 86 N.Y.2d 307, 341–42 (1995) (Simons, J., dissenting) (positing that court should not interfere in constitutional responsibilities assigned to other branches and maintaining that "the legislature is far more able than the courts to balance and determine State-wide needs and equities").

90 *See* U.S. CONST. art III, § 2, cl. 1 (announcing power of judiciary branch of United States and explaining that in order for the judiciary to be implicated, there must be a live case or controversy at issue); *see also* Marbury v. Madison, 5 U.S. 137, 165–66 (1803) (holding that there are some question, "political questions," that judiciary cannot answer because they are within discretion of another branch of government).

91 *See* Gerald Benjamin, *Reform in New York: The Budget, The Legislature, and the Governance Process*, 67 ALB. L. REV. 1021, 1025 (2004) (explaining that when state legislature fails to deal with an issue effectively, it becomes the judiciary's job to intervene and arguing that this approach has been seen quite often in the area of education finance reform); *see also CFE II*, 801 N.E.2d at 348–49 (ordering State to determine cost of "providing a sound basic education in New York City" and to enact reforms appropriate to providing such an education because the legislative response had failed to establish a sound educational system within the state).

the makeup of New York State itself. It is very difficult for the legislature to determine the budget and tax structure of a state which contains one of the major metropolitan areas in the entire world, combined with an upstate area that is fundamentally different in economy, political atmosphere, tax structure, financial need, and culture.[92] It appears that, in evaluating the needs of both New York City and the rest of New York State, the Legislature needs to give special consideration to the City of New York in all state matters. This approach would benefit the residents of the City of New York, Upstate New York, Long Island and the State of New York as a whole.

92 *See* Gerald Benjamin, *The Mandatory Constitutional Convention Referendum: The New York Experience in National Context*, 65 ALB. L. REV. 1017, 1017 (2002) (commenting on plight of New York legislature and stating that as a result of its often "inadequate" performance "voters expressed little confidence in government"); *see also* Eric Lane, *Special Issue on Legislation: Statutory and Constitutional Interpretation: Legislative Process and its Judicial Renderings: A Study in Contrast*, 48 U. PITT. L. REV. 639, 643–44 (1987) (explaining that legislators "generally believe they are responsible for expressing in legislature the dominant views of their constituents," and suggesting that it is through contact with the people of their area that legislators are educated on determinative legislative issues).